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No. 84-1200

In the Supreme Court of the United States

OCTOBER TERM, 1984

EDWIN MEESE, III,
ATTORNEY GENERAL, ET AL., PETITIONERS

v.

HENRY W. SEGAR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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1. Respondents contend (Br. in Opp. 2-3) that "[F]rom the outset, the case proceeded on both disparate treatment and disparate impact theories", and allege that we inaccurately portray this case as one in which "a disparate treatment case [has been] transformed, by a stroke of the court of appeals' pen, into a disparate impact case" (Br. in Opp. 10). It is true, as we acknowledged in our petition (at 2 n.2), that respondents labeled several of their claims as involving disparate impact. The courts below did not dispute these labels, although respondents did not identify any test or other employment selection criterion as the basis for their claims.[1] Those claims were presented, and treated by the

[1]In their response to our petition, respondents state that they "identified before trial each employment practice they challenged * * *[, and] presented evidence separately and independently on each" (Br. in Opp. 2). But both their citation of authority and the response itself reveal

courts, largely on the basis of the same kind of statistical evidence that underlay the disparate treatment claims. The argument put forth by respondents and incorrectly accepted by the courts below was that such evidence, if sufficient to establish a disparate treatment claim, is *a fortiori* sufficient

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that the "employment practice[s]" to which they refer are "initial grade assignments, work assignments, supervisory evaluations, discipline, and promotions" (Br. in Opp. 1), and the evidence presented as to each was simply statistical comparisons of the cumulative effect of each of these on blacks and whites (see, *e.g.*, Pet. App. 106a-119a). As the Fifth Circuit explained in *Pouncy* v. *Prudential Insurance Co.*, 668 F.2d 795, 801-802 (1982):

> The disparate impact model requires proof of a causal connection between a challenged employment practice and the composition of the work force. Aptitude tests, height and weight requirements, and similiar selection criteria all may be shown to affect one class of employees more harshly than another by controlling for the impact of the employment practice on one class in the employer's work force so that it can be measured. For example, in *Griggs* [v. *Duke Power Co.*, 401 U.S. 424 (1971)] the plaintiff proved not just a racial imbalance in the employer's work force, but also that the employer's educational requirement resulted in disqualifying a higher percentage of black employees than white employees. 401 U.S. at 430 n.6 * * *. In an action challenging an employer's height and weight requirements, the plaintiff demonstrated that, as compared to men, a disproportionate number of women were automatically disqualified from obtaining jobs as corrections counselors. *Dothard* [v. *Rawlinson*], 433 U.S. [321,] at 329-30 & n.12 * * * [1977].
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> By contrast, Pouncy has not shown, nor can he show, that independent of other factors the employment practices he challenges [the failure to post job openings and the reliance on in-house promotions and subjective employee evaluation criteria] have caused the racial imbalance in Prudential's work force. The statistics presented by the appellant do show that, on the whole, blacks are over-represented in the lower levels of Prudential's work force. But this might result from any number of causes. Absent proof that the disparate impact is caused by one or more of the challenged employment practices, we do not require the employer to justify the legitimacy of any (or all) employment practices.

to show disparate impact (Pet. App. 139a, 19a-20a, 31a; Plaintiffs' Post-Trial Memo. 8-11). It is precisely this blurring of the difference between disparate impact and disparate treatment analysis that, we submit, merits review by this Court (see Pet. 16-17).

Indeed, the need for this Court's review has not been highlighted by *Griffin* v. *Carlin,* No. 84-3070 (Mar. 28, 1985), in which the Eleventh Circuit agreed with the analysis of the instant court, and directed the district court, on remand, that "defendants may not rebut [a] presumption of discrimination by reliance on [neutral selection procedures] unless those procedures have been validated as required under a disparate impact analysis" (slip op. 2781).[2] That decision thus confirms our prediction (Pet. 20) that the rule announced by the court below will have an immediate adverse impact on the orderly conduct of Title VII litigation.

2. Respondents incorrectly assert (Br. in Opp. 15) that the decision below is consistent with established Title VII principles. But in fact, this Court has emphasized (*Hazelwood School District* v. *United States*, 433 U.S. 299, 308 n.13 (1977), citing *Mayor* v. *Educational Equality League*, 415 U.S. 605, 620-621 (1974)) that comparative statistics are competent only when they take into account the special qualifications for the position in question. By ignoring the specialized experience required of persons hired at the GS-9 level, the courts below relied on statistical evidence that failed to establish a prima facie case, because it failed to reflect the relevant basic objective job requirements.

3. Finally, respondents' repeated assertions (Br. in Opp. 5, 11, 12) that petitioners cannot prevail because they failed to introduce evidence to support their claims reflect a basic

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[2]We are lodging 10 copies of the *Griffin* decision with the clerk of this Court.

misapprehension of the applicable burdens of proof. Since, as we have explained in our petition (at 20-27), respondents' statistical evidence had no significant probative value, petitioners should not have been required to assume the burden of establishing the existence of disparities in specialized experience among blacks and whites to justify the differences in entry level grades.[3] In any event, it is inaccurate to assert that petitioners "produced not a shred of evidence that a difference between the races in 'specialized experience' even existed, let alone that it explained the [statistical] disparities" (Br. in Opp. 12). The relevance of disparities in experience was not initially apparent; it was raised at trial by the inadequacy of respondents' statistics. When the burden of showing that the difference in experience explained the statistical disparity was improperly placed on the defendants, we met and carried that burden by demonstrating that the differences in initial placement allegedly attributable to race were, in fact, due to varying amounts of prior job related experience (see Pet. 9-10).

For the foregoing reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

APRIL 1984

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[3]Respondents' quotation (Br. in Opp. 5) from petitioners' expert witness Spradlin is taken out of context. Spradlin was explaining his use of cohort analyses, in which the employment history of employees who enter at the same grades are compared. In context, therefore, he was simply stating that there did not appear to be significant disparities among various individuals who were hired at grade 7, or among those hired at grade 9. He was not considering the differences between those hired at grade 9 and those hired at grade 7, or whether whites were more likely than blacks to have the extra year of specialized experience required for entry at grade 9.